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FUJIAN JINHUA INTEGRATED CIRCUIT CO., LTD.

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

v.

UNITED MICROELECTRONICS
CORPORATION, *et al.*,

Defendants.

CASE NO.: 3:18-cr-00465-MMC

**DEFENDANT FUJIAN JINHUA
INTEGRATED CIRCUIT CO., LTD.'S
REPLY IN SUPPORT OF MOTION
TO EXCLUDE EXHIBIT P1168**

Judge: The Honorable Maxine M. Chesney
Trial Date: February 28, 2022

1 **I. INTRODUCTION**

2 Exhibit P1168 is not a standard business computer file containing routine business records,
3 like a listing of customer names or transaction details. Rather, Exhibit P1168 purports to be the output
4 of a sophisticated computer surveillance technology, the SMART-IT System, that was queried by an
5 engineer in Taiwan, Jeff OChen—after JT Ho and Neil Lee were suspected of trade secret theft—to
6 retrieve and export targeted datapoints relating to usage of a particular USB device in a defined time
7 period. The process of creating Exhibit P1168 can fairly be described as a computer forensics
8 inquiry—not the retrieval of typical business records.

9 However, the government did not call Mr. OChen as a witness to try to lay a foundation for
10 Exhibit P1168. When the government instead offered Exhibit P1168 during the testimony of UMC
11 employee CS Chang, Jinhua orally objected because: (1) Mr. Chang lacked sufficient information to
12 authenticate the document, and (2) the document was not a business record. The Court invited the
13 parties to provide further briefing on the issue. *See* Def's Mot. to Exclude Exhibit P1168 (ECF 373);
14 United States' Mot. to Admit Exhibit P1168 (ECF 372). For the first time, the government's brief
15 attached a newly created certification from Mr. OChen, dated March 3, 2022, which provided a
16 cursory summary of the surveillance capabilities of the SMART-IT System, the forensic queries he
17 undertook to create and export the data comprising Exhibit P1168, and an affirmation that the
18 contents of P1168 are the same as when the SMART-IT system allegedly created the spreadsheet.

19 The government asks the Court to admit the exhibit on the basis of this new certification. But
20 this would violate Jinhua's rights in three ways. First, both P1168 and the OChen certification contain
21 testimonial assertions that implicate Jinhua's right under the Confrontation Clause to cross-examine
22 Mr. OChen. Second, the prosecution failed to give Jinhua pretrial notice of the certification as
23 required by Fed. R. Evid. 902(11) & (13). As a result, Jinhua has been deprived of the opportunity
24 to investigate and obtain the assistance of technical expertise to rebut Mr. OChen's testimonial
25 assertions. Third, the exhibit is not an ordinary business record but rather the output of a forensic
26 inquiry designed to create evidence for this trial. As such, the document is hearsay and, at most,
27 could be an exhibit that helps Mr. OChen explain his testimony about the investigation he conducted.
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1 **II. ARGUMENT**

2 **A. The Confrontation Clause**

3 In this criminal trial, Jinhua has the constitutional right to confront Mr. OChen regarding the
4 forensic inquiry he undertook to create Exhibit P1168. Mr. Chang testified that he reached out to Mr.
5 OChen because of suspicions that Mr. Ho and Mr. Lee’s laptops were being used to commit a
6 crime—trade secret theft. Therefore, the “primary purpose” of the creation of P1168 was “to establish
7 or prove past events potentially relevant to later criminal prosecution.” *Davis v. Washington*, 547
8 U.S. 813, 822 (2006).

9 Moreover, it is well-established that “[d]ocuments kept in the regular course of business”
10 may not be admitted under the Confrontation Clause “if the regularly conducted business activity is
11 the production of evidence for use at trial.” *Melendez-Diaz v. Mass.*, 557 U.S. 305, 321 (2009); *see*
12 *also Bullcoming v. New Mexico*, 564 U.S. 647, 664 (2011) (“A document created solely for an
13 ‘evidentiary purpose,’ *Melendez-Diaz* clarified, made in aid of a police investigation, ranks as
14 testimonial.”). Such “a document prepared for purposes of litigation is not a business record because
15 it is lacking in trustworthiness.” *Clark v. City of Los Angeles*, 650 F.2d 1033, 1037 (9th Cir. 1981)
16 (quoting *Palmer v. Hoffman*, 318 U.S. 109 (1943)); *see also United States v. Olano*, 62 F.3d 1180,
17 1205 (9th Cir. 1995); *United States v. Baxter*, 492 F.2d 150, 165 (9th Cir. 1973). Under this Rule, in
18 addition to P1168’s inadmissibility under the Confrontation Clause (even if it, somehow, qualifies
19 as a business record), Mr. OChen’s business record certification, which was by definition prepared
20 for litigation, is seemingly also inadmissible.

21 However, in *Melendez-Diaz*, the Supreme Court recognized a narrow historical exception to
22 the general rule that evidence “prepared for use at trial” is inadmissible; traditionally, a clerk could
23 “authentica[t] an official record—or a copy thereof—for use as evidence.” 557 U.S. at 322. But this
24 exception did not allow the clerk to “create a record for the sole purpose of providing evidence
25 against a defendant.” *Id.* at 323. For example, the prosecution could not admit into evidence “a clerk’s
26 certificate attesting to the fact that the clerk had searched for a particular relevant record and failed
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1 to find it” because the “statement would serve as substantive evidence against the defendant whose
2 guilt depended on the nonexistence of the record for which the clerk searched.” *Id.* at 323.

3 In *United States v. Bustamante*, 687 F.3d 1190 (9th Cir. 2012), the Ninth Circuit applied
4 *Melendez-Diaz* to exclude evidence similar to Mr. OChen’s certification. There, the government
5 introduced what “purported to be a ‘copy’ of” the defendant’s birth certificate to prove that he was
6 not a U.S. citizen. *Id.* at 1192. In reality, this document was a certification from the Office of a Local
7 Civil Registrar in the Philippines that “transcribe[d] the information contained . . . [in] the office’s
8 birth records.” *Id.* Relying on *Melendez-Diaz*, the Ninth Circuit explained that the certification was
9 “an affidavit testifying to the contents of the birth records of the City of Bacolod and is ‘functionally
10 identical to [the] live, in-court testimony’ that an employee of the Civil Registrar’s office might have
11 provided.” *Id.* at 1194 (quoting *Melendez-Diaz*, 557 U.S. at 310–11). And because “[i]t was also
12 created for the purpose of the . . . investigation into [the defendant’s] citizenship and was ‘made
13 under circumstances which would lead an objective witness reasonably to believe that the statement
14 would be available for use at a later trial,’” *id.* (quoting *Melendez-Diaz*, 557 U.S. at 311), the Ninth
15 Circuit held that the admission “violated [the defendant’s] confrontation rights because [he] did not
16 have a prior opportunity to examine [the affiant],” *id.* (citing *Crawford v. Washington*, 541 U.S. 36,
17 38–39 (2004)).

18 A month later, the Ninth Circuit addressed *Melendez-Diaz* and *Bustamante* specifically in the
19 context of an 18 U.S.C. § 3505 foreign record certification. In *United States v. Anekwu*, 695 F.3d
20 967 (9th Cir. 2012), “[t]he primary question raised on appeal [was] whether the district court
21 committed plain error by admitting certificates of authentication for foreign public and business
22 records by means of affidavit in violation of the Confrontation Clause.” *Id.* at 971. The Ninth Circuit
23 concluded that the district court did not plainly err in admitting the certifications. *See id.* at 977. But
24 the court explained that the certifications certified “that the documents [were] true copies and that
25 the person certifying the documents [was] the custodian,” and while “[t]he certificates name[d] the
26 company and the date dissolved in order to specify the company to which the certificate applie[d,]
27 [t]his information [did] not interpret what the records contain[ed] or certify their substance or effect.”
28 *Id.* at 975 (emphasis added). Therefore, even though the *Melendez-Diaz* exception was limited to a

1 government clerk certifying official records, because the certifications “were not substantive
2 evidence” and the certified records were “otherwise admissible,” the court affirmed the defendant’s
3 convictions. *Id.* at 976–77.

4 P1168 was testimonial because it was prepared “under circumstances which would lead an
5 objective witness reasonably to believe that the statement would be available for use at a later trial.”
6 *Crawford*, 541 U.S. at 52 (citation omitted). And Mr. OChen’s certification interpreted and provided
7 testimony about P1168 that is “functionally identical to live, in-court testimony,” and does “precisely
8 what a witness does on direct examination.” *Melendez-Diaz*, 557 U.S. at 310–11 (quoting *Davis*, 547
9 U.S. at 830). Mr. OChen’s certification states, for example, that:

- 10 • “No human intervention is required for SMART-IT to log those actions.”
- 11 • “SMART-IT automatically logs instances when UMC employees perform actions with
12 USB devices.”
- 13 • “I have reviewed the log files for computers UMC035551 and UMC035481.”
- 14 • “I am the person who originally retrieved the Excel file.”
- 15 • “I accessed the SMART-IT server and exported data from it into the Excel spreadsheet, a
16 copy of which is labeled as P1168,”
- 17 • “The data was output from SMART-IT to an Excel file to identify all logged USB activity
18 associated with computer UMC035551 and UMC035481.”
- 19 • “[E]xhibit P1168 is a true and accurate copy of information that was captured and stored by
20 the SMART-IT system.”

21 In sum, there are two layers of Confrontation Clause issues here. The underlying record—
22 P1168—is testimonial because it was prepared in response to suspicions that Mr. Ho and Mr. Lee
23 were engaged in trade secret theft. And “[r]ather than simply authenticat[e] an existing non-
24 testimonial record, [Mr. OChen] created a new record for the purpose of providing evidence against
25 [Jinhua].” *Bustamante*, 687 F.3d at 1194. He “certif[ied]” the “substance” of the record. *Anekwu*,
26 695 F.3d at 975. Therefore, both P1168 and Mr. OChen’s certification are testimonial and cannot be
27 admitted absent compliance with the strictures of the Confrontation Clause.

28 **B. No Required Notice**

In its title, Mr. OChen’s certification states that it was offered “pursuant to Federal Rules of
Evidence 902(11) and 902(13) and 18 U.S.C § 3505.” But those provisions specifically require that

1 such a certification be shared with the adverse party prior to trial. Specifically, to make use of Rule
 2 902(11), the proponent of the evidence must meet the following clear requirement: “Before the trial
 3 or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer
 4 the record—and must make the record and certification available for inspection—so that the party
 5 has a fair opportunity to challenge them.” Fed. R. Evid. 902(11) (emphasis added).¹ The same
 6 requirement applies to Rule 902(13). Fed. R. Evid. 902(13) (“The proponent must also meet the
 7 notice requirement of Rule 902(11).”). And § 3505 provides that “[a]t the arraignment or as soon
 8 after the arraignment as practicable, a party intending to offer in evidence under this section a foreign
 9 record of regularly conducted activity shall provide written notice of that intention to each other
 10 party.” 18 U.S.C. § 3505(b) (emphasis added).

11 Here, the government failed to provide any pretrial notice of the OChen certification. Indeed,
 12 Mr. OChen’s certification was not signed and submitted until March 3, 2022, and only in response
 13 to Jinhua’s midtrial, oral objection to Exhibit P1168. This failure of notice is particularly prejudicial
 14 when the government is offering the complex output of a sophisticated technical surveillance system.
 15 As the Advisory Committee Notes observes: “A challenge to the authenticity of electronic evidence
 16 may require technical information about the system or process at issue, including possibly retaining
 17 a forensic technical expert; such factors will affect whether the opponent has a fair opportunity to
 18 challenge the evidence given the notice provided.” Fed. R. Evid. 902, Advisory Committee Note.
 19 Jinhua is in no position midtrial to undertake the sort of technical analysis, with expert assistance,
 20 required to address the forensic inquiries undertaken and memorialized by Mr. OChen.

21 The way the government proposes to proceed is doubly prejudicial to Jinhua. Not only would
 22 the government deprive Jinhua of an opportunity to cross-examine Mr. OChen, but the government
 23 also belatedly disclosed Mr. OChen’s certification so that Jinhua lacked the time to prepare a
 24 technical rebuttal.

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 28 ¹ Jinhua also notes that Rule 902(11) does not apply in this criminal case. *See* Fed. R. Evid. 902(11) (discussing admission of *domestic* records).

C. Not a Business Record

Finally, Exhibit P1168 is the output of a computer forensics inquiry, not an ordinary business record. In response to suspected criminal activity, Mr. OChen queried the UMC computer systems looking for data supporting an allegation of misconduct. This was a targeted inquiry, not the storing and retrieval of routine business records. As Mr. Chang testified, despite his long history in UMC’s IT department, he had never even seen a SMART-IT log file. Trial Tr. Vol. III, at 576:2-4. The business records exception does not apply. *See Paddack v. Dave Christensen, Inc.*, 745 F.2d 1254, 1258 (9th Cir. 1984) (holding that reports from an audit conducted after suspected breach of collective bargaining agreements were not business records, in part, because “they were prepared in anticipation of litigation”); *see also Palmer v. Hoffman*, 318 U.S. 109, 113–14 (1943) (holding that a train engineer’s statement during an internal investigation into a train accident was not a business record because the business was railroading—not investigating accidents—and “the[] reports [were] calculated for use essentially in the court, not in the business. Their primary utility [was] in litigating, not in railroading.”).

CONCLUSION

For the reasons set forth above, as well as Jinhua's March 3, 2022, Motion to Exclude Exhibit P1168, the Court should exclude the Excel spreadsheet labeled P1168.

Dated: March 16, 2022

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